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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 363

STRONGHOLD SCREW PRODUCTS, INC.,
Petitioner,

vs.

INDEPENDENT NAIL AND PACKING COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

CASPER W. OOMS,
209 So. La Salle Street,
Chicago 4, Illinois,
Attorney for Petitioner.

ROBERT C. WILLIAMS,
209 So. La Salle Street,
Chicago 4, Illinois,
Of Counsel.

September 16, 1953.

THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the United States:

Petitioner, Stronghold Screw Products, Inc., respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment entered by that Court on July 9, 1953, reversing the judgment of the District Court, which had dismissed Respondent's Complaint alleging trade-mark infringement and unfair competition.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1) and 2101 (c). Judgment was entered by the Court of Appeals on July 9, 1953 (R. 471).

OPINIONS BELOW.

The Opinion of the District Court dated October 1, 1952, (R. 437) is published at 107 F. Supp. 969. The Findings of Fact and Conclusions of Law were entered December 19, 1952, (R. 447).

The Opinion of the Court of Appeals for the Seventh Circuit was entered July 9, 1953, (R. 462) and reported at 98 U. S. P. Q. 172 and 205 F. 2d. .....

The Court of Appeals held Respondent's Registered Trade-Mark:

infringed by Petitioner's logotype:

merely because of the use of the descriptive word:

STRONGHOLD

in which Respondent asserts monopoly rights as applied to fastener products, and held Petitioner's use of this word an infringement of a common law trade-mark and unfair competition.

QUESTIONS PRESENTED.

May a Court of Appeals apply as a test of descriptiveness in trade-mark matters, the concept that a word may be descriptive *only* when used as a noun to name the article, or is that Court required to apply the test laid down by this Court and the other Courts of Appeals that a word is also descriptive when used as an adjective or adverb to describe the qualities or characteristics of the article?

May the descriptive word "Stronghold" be appropriated to the exclusive and monopolized use of Respondent when that word has been employed ONLY with a patented nail characterized by the *strong hold* it has on materials nailed therewith?

May a registrant of a trade-mark consisting of a complex and arbitrary logotype design upon which the descriptive word "Stronghold" appears as one of the components prevent use of the word "Stronghold" alone or in an entirely dissimilar logotype design?

In deciding questions of unfair competition under the doctrine of *Erie* v. *Tompkins*, 304 U. S. 64, is the Court of Appeals required to apply the State law according to the latest State decisions, or is it free to disregard those latest State decisions and independently interpret the meaning of the earlier cases?

May Rule 52 (a) be disregarded by the Court of Appeals when the District Court has made specific Findings on the issues of confusion, descriptiveness and unfair competition, all of which are supported by substantial evidence?

May a Court of Appeals rely solely on clearly improper deposition testimony to set aside Findings which are supported by substantial evidence in the Record made before the District Judge?

STATEMENT OF THE CASE.

Respondent filed its Complaint (R. 3) on April 26, 1948, claiming infringement of a common law trade-mark, infringement of a registered trade-mark and unfair competition. It has waived all claim to damages, but seeks to enjoin Petitioner's further use of the descriptive word STRONGHOLD in the latter's screw, nut and bolt business.

Respondent took depositions in Boston in July, 1949 (R. 17-97), in New York and Ambler, Pennsylvania, in April, 1951 (R. 97-184).

The case was tried on December 3, 4, 5 and 6, 1951 (R. 184-436) before Hon. J. Sam Perry, who had ample opportunity to evaluate the credibility of the principal witnesses.

Judge Perry's opinion (R. 437) and his Findings of Fact and Conclusions of Law (R. 447) completely vindicate Petioner's use of the word STRONGHOLD.

The Court of Appeals ignored the conclusive effect of the Findings of Fact required by Rule 52 (a) and reversed.

a. The Facts as to the Use of the Word By the Parties.

In 1934 Respondent began manufacturing a new nail having a peculiar annular thread with appreciably *increased holding power* over the ordinary smooth-shanked nail. Driven into a piece of wood, the nail's annular thread resisted withdrawal. As Respondent has so aptly stated in its advertising (Pl. Ex. 12, Appendix) the "wood fibers interlock with barbs of the nail, holding it firmly in position." In other words, the barbed thread gave the nail a more firm hold on the wood—a stronger hold. The nail was a strong holding nail. The patents so described it (Pl. Ex. 100, 101).

Respondent's advertising, admittedly extensive, has emphasized the holding power of that nail, and from the

beginning *the particular nail* has been identified as "the Stronghold nail" (R. 188, 269, Finding 9, R. 449). Actually, the word STRONGHOLD was employed by Respondent principally to identify *the particular annular thread* of that nail (R. 26, 41, 45, 51, 72, 257, 269, 271, 274, 275, 300, 304, 308, 312, 313, Finding 8, R. 448). See the first three sheets in the Appendix hereto.

The inception of the use of the word was described by H. James Stone, Respondent's general manager (R. 271-2):

> "Q. Did you have a rule about the use of the word Stronghold on your containers?
>
> "A. Yes. That rule, which I think I myself established, was this: That from 1934 on, and *I am very clear on it,* since I was originally involved in the development of the name Stronghold, we needed to be sure that every item in the plant that was threaded, screw threaded, *with the Stronghold thread,* it needed to be kept distinct from plain smooth shank goods. Therefore we were very careful about the markings on these containers. They had to have the word Stronghold on them, unless there be any confusion." (Emphasis supplied.)

But the intended trade-mark, according to George C. Stone, Respondent's president, was the complex device registered (R. 206-7):

> "Q. Sometime in 1936 did you add another brand name or other mark on these goods?
>
> "A. Well, we used *the trade-mark,* yes. We decided that *instead of using the name alone* we should have some sort of a distinctive mark because the nail was meeting with popular reception and we thought we would capitalize on it, and as a result we designed a very striking, colorful label, *with a trade-mark,* and our idea being to implant THAT and associate it with our product." (Emphasis supplied.)

And associate it with "the product" (singular) they did. The uncontradicted fact is that Respondent used the word

Stronghold only with the nails having the peculiar annular thread until after this suit was filed.

But the Court of Appeals' opinion holds (R. 466):

> "* * * The Court also found that throughout the years plaintiff used the 'Stronghold' designation in connection with only one of its products, to wit, the nail with the annular thread. We think these findings are clearly erroneous."

This case was filed on April 26, 1948. There is not a shred of evidence to show ANY earlier use of the word Stronghold in connection with a product other than the nail with the exceptional holding power. The District Court so found (Findings 10, 11, 16, R. 449-50). The Court of Appeals' statement to the contrary is just plain wrong.

Petitioner first used the word STRONGHOLD on its line of screws, nuts, bolts, etc., in a catalog in October, 1938, the word appearing in script. In 1940 the word was presented in the distinctive logotype and used on all of Petitioner's labels, business forms, stationery, etc.

Respondent was immediately aware of Petitioner's use of the logotype, because the parties were doing business together (R. 399). But H. James Stone testified (R. 278):

> "* * * It did not seem to me that there was anything there that particularly disturbed us."

Not until 1946 did Respondent register its FIRST complaint. Eighteen months later this suit was filed.

b. The Facts as to the Likelihood of Confusion in the Trade.

Respondent failed, utterly, in its attempt to prove the existence or likelihood of confusion in the trade. The District Court so held. George Stone, Respondent's president, testified (R. 260):

"Q. Mr. Stone, can you give us a single instance in

which any of your customers mistakenly bought any products from Stronghold Screw Products instead of your company?

"A. No."

His brother, H. James Stone, Respondent's general manager, testified (R. 286):

"A. I don't know that anyone has been buying from Stronghold Screw Products that meant to buy goods from us. I don't know whether any such case has occurred or not."

This evidence alone should satisfy any test of confusion or likelihood of confusion. The parties operated for 13 years (1938 to 1951—date of the trial) without one single case of confusion coming to the attention of Respondent's officers.

c. The Impact of the Decision of the Court of Appeals.

The Court of Appeals' decision sanctions and approves Respondent's devious attempt to do by indirection and subterfuge that which the law does not permit it to do openly and that which it had decided not to do in 1936—use "Stronghold" as a technical trade-mark (R. 206-7).

The Court of Appeals has approved a monopoly in the obviously descriptive word "Stronghold",—merely one component of the complex device registered. By attempting to enforce the descriptive component, Respondent has circumvented the legal safeguards which protect the public.

The decision of the Court of Appeals approves this circuitous practice which will destroy the public right to employ common terms of the language in their descriptive meanings, without interference from schemers who register a complex device and then enforce the parts thereof piecemeal.

d. Conclusion as to the Facts.

The parties hereto have both used the descriptive word "Stronghold" in the fastener field for years. During that time no confusion of source or goods has ever arisen.

Respondent has employed the word descriptively in advertising the nail with the peculiar annular thread. Only long after the suit was filed did Respondent employ the word other than to identify the particular threaded product.

Petitioner's use of the word has been in its distinctive logotype form since 1940, and in script since 1938. It has been applied to Petitioner's entire line of fasteners.

The judgment of the Court of Appeals will, unless corrected, require Petitioner to change its corporate name and destroy its logotype—in use since 1940. It approves a practice in which a complex device is registered and the descriptive parts enforced piecemeal.

SPECIFICATION OF ERRORS.

1. The decision of the Court of Appeals giving sanction to a claim of monopoly in a descriptive word conflicts with prior decisions of this Court and of the Courts of Appeals of other Circuits.

Standard Paint Co. v. *Trinidad Asphalt Mfg. Co.* (1911), 220 U. S. 446.

William R. Warner & Co. v. *Eli Lilly & Co.* (1924), 265 U. S. 526.

Rosenberg v. *Shakeproof Lock Washer Co.* (C. A. 3, 1938), 100 F. 2d 811,

Computing Scale Co. v. *Standard Computing Scale Co., Ltd.* (C. A. 6, 1902), 118 F. 965.

Wisconsin Electric Co. v. *Dumore Co.* (C. A. 6, 1929), 35 F. 2d 555.

2. The decision of the Court of Appeals sanctions a circuitous evasion of the basic trade-mark law forbidding the enforcement of trade-mark rights in descriptive words which are but a component of a complex registered mark.

3. The decision of the Court of Appeals, while giving lip-service to the mandate of *Erie Railroad* v. *Tompkins*, promulgates an interpretation of the law of unfair competition which directly conflicts with the law of Illinois, as expounded by the Illinois Appellate Court and followed by earlier decisions of the United States courts.

Erie Railroad v. *Tompkins* (1938), 304 U. S. 64.

Lady Esther, Ltd. v. *Lady Esther Corset Shoppe, Inc.* (Ill. App., 1943), 317 Ill. App. 451.

Good Housekeeping Shops, Inc. v. *Hyman Kaye and Harry Cohen Trading as Good Housekeeping Table Pad Company* (Ill. App., 1947), 330 Ill. App. 376.

General Industries Co. v. *20 Wacker Drive Building Corp.* (C. A. 7, 1946), 156 F. 2d 474.

Wilhartz v. *Turco Products, Inc.* (C. A. 7, 1947), 164 F. 2d 731.

Elastic Stop Nut Corporation of America v. *Greer* (D. C. Ill., 1945), 62 F. S. 363.

Metropolitan Opera Assn., Inc. v. *Metropolitan Opera Assn. of Chicago, Inc.* (D. C. Ill., 1948), 81 F. S. 127.

4. The Court of Appeals set aside the Findings of Fact of the District Court in clear contravention of Rule 52(a), since those Findings are supported by substantial evidence.

5. The Court of Appeals erred in relying on deposition testimony elicited in response to objectionable leading questions to set aside Findings based on testimony obtained in Court according to the Rules of Evidence.

REASONS FOR GRANTING THE WRIT.

The Courts of Appeals are deviating from the test of descriptiveness laid down by this Court. It is vital that uniformity be re-established. Likewise no authoritative interpretation of the infringement section of the Lanham Act has been made. The section is new and requires a clarifying opinion. The Courts of Appeals continue to circumvent Rule 52(a), and an additional statement is required to hold that tendency in check.

A novel question is presented in this case as a result of the reliance by the Court of Appeals on the clearly objectionable deposition evidence. The use of such testimony by Courts of Appeals as the basis for setting aside Findings must be prevented.

The truly extraordinary situation here requires the exercise of the Court's basic supervisory jurisdiction to obtain compliance by the lower Courts with the letter and the spirit of the doctrine of *Erie Railroad* v. *Tompkins*. Federal Courts are not permitted to expound the State law without regard to the latest State decisions, thereby circumventing *Erie* v. *Tompkins*.

ARGUMENT.

1. The Conflict Between This Decision and Earlier Decisions of This Court and Other of the Courts of Appeals on the Question of the Standards of Descriptiveness Requires an Authoritative Opinion Re-Establishing Uniformity.

The Court of Appeals set aside the District Court's Findings Nos. 10, 11 and 17 (R. 449-50) (that the word STRONGHOLD is descriptive as used by Respondent). The legal test applied to reach this result appears in the opinion (R. 466):

> "Although the word 'Stronghold' is suggestive of one of the attributes of plaintiff's nail with the annular thread, it is not descriptive of a nail, let alone that type of nail. A person unaware of the particular product or the manufacturer, upon seeing or hearing the name 'Stronghold,' would find it virtually impossible to *identify* the product to which it might have been applied. The label 'Stronghold' on a carton, with no other words to designate the contents, would never reveal that such contents were nails of a particular type." (Emphasis supplied.)

The test is out of touch with the decisions of this Court and commercial reality. The only word which would satisfy it is the *noun* which is the *proper name* of the article.

It would permit relief to a manufacturer who placed the descriptive words "High Speed" on an otherwise plain box containing a motor capable of running fast, because it does not "identify" the product as a motor. Such a strangle-hold on the use of a purely descriptive term would be detrimental to the public interest in free competition.

This Court's test for descriptiveness has uniformly been

that a word is descriptive, not only when it is used as a *noun* to "identify" the goods, but also when it is used as an *adjective* or *adverb* to indicate a quality or characteristic of the goods. *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.* (1911), 220 U. S. 446; *William R. Warner & Co.* v. *Eli Lilly & Co.* (1924), 265 U. S. 526. The conflict between the Court of Appeals' opinion and these decisions is a glaring one and must be rectified in the interest of uniformity.

In *Standard Paint Co.* v. *Trinidad Asphalt Mfg. Co.* (1911), 220 U. S. 446, appellant sought to enforce its registered trade-mark comprising the word "Ruberoid" against appellee's use of the word "Rubbero" on similar goods. The Court quotes (p. 454) with approval the language from *Canal Company* v. *Clark*, 13 Wall (80 U. S.) 311, 323, where the legal test for descriptiveness appears:

> "• • • Nor can a generic name, or a name merely *descriptive* of an article of trade, of its *qualities*, ingredients, or *characteristics*, be employed as a trademark and the exclusive use of it be entitled to legal protection." (Emphasis supplied.)

The Court held that "Ruberoid" is a misspelling of "rubberoid", which means "rubber-like". The word is descriptive when applied to a roofing material having the qualities or characteristics of flexibility and being waterproof (220 U. S. 455).

But compare the test of the Court of Appeals: the label "ruberoid" on a carton would never reveal that the contents thereof were roofing materials of a particular type.

In *William R. Warner & Co.* v. *Eli Lilly & Co.* (1924), 265 U. S. 526, involving the Coco-Quinine conflict in the pharmaceutical field, the test is stated as (265 U. S. 528):

> "A name which is merely descriptive of the ingredients, *qualities*, or *characteristics* of an article of trade cannot be appropriated as a trademark and the

exclusive use of it afforded legal protection." (Emphasis supplied.)

The shocking conflict with this Court's decisions is apparent. The word "Stronghold" when applied to a nail having an exceptional holding quality, describes that holding quality and cannot be appropriated as a trade-mark. The test applied by the Court of Appeals is completely unrealistic and disregards the controlling law.

Other jurisdictions have followed this standard of descriptiveness. The conflict with the Seventh Circuit is most sharply revealed in the "Self-Tapping" case (*Rosenberg et al.* v. *Shakeproof Lock Washer Co.* (C. A. 3, 1938), 100 F. 2d 811). There plaintiff's attempt to monopolize "Self-Tapping" as applied to a screw having the ability to "self tap" its thread in a piece of sheet metal was stopped by the District Court (20 F. Supp. 959 at 963):

> "Obviously, the two words together mean that the screw taps itself. In other words, that the screw itself threads its hole. That a purely descriptive word cannot be appropriated by anyone as a trade-mark is so well settled as to need no citation of authority."

The endorsement of this position by the Court of Appeals for the Third Circuit appears at 100 F. 2d 812:

> "To the above we may add that we also agree with the court's holding that the plaintiffs cannot monopolize the use of the words 'self tapping' in connection with screws."

But the conflicting test of the Seventh Circuit would require a different result, because "the label" "Self-Tapping" "on a carton, with no other words to designate the contents, would never reveal that such contents were" screws "of a particular type."

In *Computing Scale Co.* v. *Standard Computing Scale Co., Ltd.* (C. A. 6, 1902, 118 F. 965), plaintiff was attempting

to enforce a monopoly in the words "computing" and "standard" as used on scales which showed the weight and the money value of the goods being weighed. The words were held to be descriptive when so used.

In evaluating the word "Dumore" in *Wisconsin Electric Co.* v. *Dumore Co.* (C. A. 6, 1929), 35 F. 2d 555, the court held (p. 557):

> "The District Court inclined to the belief, and our judgment is, that this 'made up' word was descriptive of the characteristics of the electric tools and appliances manufactured and sold by plaintiff. It rather clearly signified to any prospective purchaser that these tools had superior capabilities."

But the word STRONGHOLD clearly signifies to prospective purchasers that these nails have superior holding power. Respondent so advertised them, and the witnesses so described them (Findings 9, 10, 17, R. 449-50).

The Seventh Circuit's deviation from the proper standard of descriptiveness throws confusion into this field. Some will attempt to enforce clearly descriptive terms in complex registrations, while others will refrain from the rightful use of such words, rather than risk expensive litigation and the uncertain possibility of an injunction. The unpredictability engendered by this situation warrants intervention by this Court and the granting of the writ here petitioned.

Additionally, the present opinion encourages those seeking to suppress competition in related fields through the use of descriptive words. Because of the difference in tests applied, the practice of "forum-shopping" can be expected in this field. Rather than attempting to enjoin the use of common descriptive terms in jurisdictions such as the Third or Sixth Circuits, such litigants will attempt service on prospective defendants in the Seventh Circuit.

With the concentration of economic activity in and around Chicago, many nation-wide corporations are "licensed to do business" or are "doing business" (28 U. S. C. § 1391c) within the jurisdiction of the Seventh Circuit. More decisions based on this test will emanate from that Court, producing more conflicts. Such an utterly unwelcome development can be avoided by granting this writ and re-establishing uniformity in this field.

Moreover, the time is ripe for this Court to resolve the conflict between the right of a trade-mark owner to exploit legitimately the public good will, and the right of the public to be free from forestalling attempts at monopoly in descriptive terms.

2. The Finding By the Court of Appeals of Infringement of Respondent's Complex Registered Trade-Mark by Petitioner's Use of the Descriptive Word Stronghold Requires This Court to Interpret the Infringement Section of the Lanham Act.

The Court of Appeals adopted (R. 465) as its test of infringement of Respondent's registered trade-mark, the language from its 1927 decision in *Northam Warren Corp. v. Universal Cosmetic Co.* (C. A. 7, 1927), 18 F. 2d 774. There the owners of the mark "Cutex" charged infringement by "Cuticlean", both being coined words. The infringement test appears at p. 775:

> "Whether there is an infringement of a trade-mark does not depend upon the use of identical words, nor on the question as to whether they are so similar that a person looking at one would be deceived into the belief that it was the other; but it is sufficient if one adopts a trade-name or a trade-mark so like another in form, spelling, or sound that one, with a not very definite or clear recollection as to the real trade-mark, is likely to become confused or misled."

Applying this test, the Court of Appeals found infringement of Respondent's complex registered trade-mark by Petitioner's logotype displaying the descriptive word Stronghold.

The infringement section of the Lanham Act (15 U. S. C. § 1114(1)), quoted in the Appendix, tests an infringement as any

> "* * * reproduction, counterfeit, copy or colorable imitation * * *"

of a registered mark. A quick glance at page two of this petition will demonstrate that Petitioner has not used any "reproduction, counterfeit, copy or colorable imitation" of Respondent's registered mark.

This Court should clarify the test of infringement of the Lanham Act. The test applied by the Court of Appeals results in the withdrawal from the public domain of a descriptive word forming a part of a complex registered trade-mark. This is manifestly contrary to the intent of the law of trade-marks, and can result in a restriction in the use of descriptive language in the channels of commerce. The opportunity for new business to develop without a restriction, unsound economically and contrary to the basic philosophy of our entire economic system, should be paramount.

This decision can muzzle litigants in the Seventh Circuit and throughout the country. It is vital that this be prevented, and that this Court decide the question.

3. This Extraordinary Situation Requires the Exercise of This Court's Basic Supervisory Jurisdiction to Cause the Court of Appeals to Conform to the Doctrine of Erie Railroad v. Tompkins in Applying the Illinois Law of Unfair Competition.

This Court has held, in *Erie Railroad* v. *Tompkins* (1938), 304 U. S. 64, that a Federal Court must apply the substantive common law of the State in a case in which the jurisdiction of the District Court is based on diversity.

The District Court recognized this principle and held that under these facts the law of Illinois requires proof of palming off to sustain a charge of unfair competition (R. 445-6), relying on *The Stevens-Davis Co.* v. *Mather and Co.*, 230 Ill. App. 45.

The Court of Appeals held (R. 468) that the rule of the *Stevens-Davis* case (and three others of similar holding—none of which have been overruled), was no longer the law of Illinois, basing its analysis of the Illinois law on cases decided in 1942 and 1943 and disregarding later opinions clarifying these cases.

Investors Syndicate of America, Inc. v. *Edward J. Hughes,* Secretary of State (1942), 378 Ill. 413, was an administrative mandamus proceeding by a party desiring to operate as "The Investors Syndicate of America, Inc." when another corporation had previously registered and conducted an extensive business under the name "The Investors Syndicate". The case was not an unfair competition case and is authority only for the factual statement that the words "of America, Inc." would not distinguish the newcomer in the same field.

In *Lady Esther, Ltd.* v. *Lady Esther Corset Shoppe* (1943), 317 Ill. App. 451, the well-known cosmetics manufacturer was granted injunctive relief against the owner of

a small corset shop, because of an extraordinary showing of a secondary meaning in the words "Lady Esther". The Court of Appeals disregarded this requirement of a secondary meaning. But that case is inapposite because, as the District Court found (Finding 12, R. 449), THERE IS NO SECONDARY MEANING IN THE WORD STRONGHOLD.

The Court of Appeals also failed to give effect to the later Illinois cases which refuse to apply the *Lady Esther* decision, except where there is secondary meaning. One of these later clarifying cases is *Good Housekeeping Shops, Inc.*, v. *Hyman Kaye and Harry Cohen Trading as Good Housekeeping Table Pad Company* (Ill. App. 1947), 330 Ill. App. 376. There the Court *could not find a secondary meaning* and therefore refused (330 Ill. App. 384) to apply the *Lady Esther* case:

> "In our opinion the factual situation presented by the *Lady Esther* case is not analogous to the factual situation in the case at bar."

In *General Industries Co.* v. 20 *Wacker Drive Bldg. Corporation* (C. A. 7, 1946), 156 F. 2d 474, an opinion by Mr. Justice Minton prior to the *Good Housekeeping* case, General Industries Co. sued to enjoin the prospective use of "General Industries Corporation". The opinion states the reasons for not applying the *Lady Esther* case, concluding (p. 477):

> "This case cannot be controlling in the present situation where the plaintiff has acquired *no secondary meaning to its name.* The *Lady Esther* case did not turn upon the use of similar names alone. It was a case of similar names *plus a secondary meaning attaching* to one of them." (Emphasis supplied.)

Judge Duffy's opinion (R. 468-9) contains language practically identical to the last two sentences above quoted, indicating that Mr. Justice Minton's opinion was considered and then disregarded.

The *General Industries* opinion recognizes the two divergent factual situations requiring relief under the Illinois law (p. 478):

> "To entitle a private party to equitable relief, there must be wrong added to incidental confusion in the use of similar names, such as fraud, deception, or palming off, *or the name which it has sought to protect must have acquired a secondary meaning.*" (Emphasis supplied.)

Wilhartz v. *Turco Products, Inc.* (C. A. 7, 1947), 164 F. 2d 731, also by Mr. Justice Minton, was a declaratory judgment action involving the words "Auto Shampoo" on a detergent for automobiles. The opinion also expounds this portion of the Illinois law of unfair competition (p. 733):

> "It can become unfair competition only when, first the name is misused in such a manner as to deceive or probably deceive the public into believing the plaintiff's goods are the defendant's * * * (citing cases); or secondly, *where the name has acquired a secondary meaning.*" (Emphasis supplied.)

In spite of these two clear opinions of the Illinois law, the Court of Appeals disregarded them in violation of *Erie Railroad* v. *Tompkins.*

The Court of Appeals cited two *District Court* cases in which the Illinois law of unfair competition is correctly applied. In *Elastic Stop Nut Corporation of America* v. *Greer* (D. C. Ill. 1945), 62 F. Supp. 363, the Court quotes extensively from *Lady Esther* and then *states* (p. 366) that a *secondary meaning* had arisen in the style, dress, *name* and appearance of plaintiff's product (STOP NUTS).

In *Metropolitan Opera Assn. Inc.* v. *Metropolitan Opera Assn. of Chicago, Inc.* (D. C. Ill. 1948), 81 F. Supp. 127, the famous New York City corporation sought to protect its rights to the word "Metropolitan" when used in connection with the word "Opera". The title has a secondary

meaning which is universally recognized in the music worlds of the United States and Europe, based on a use of over sixty years. The District Court *states* (p. 133) that the word *has acquired a secondary meaning.*

Clearly, the test of the *Lady Esther* case is applicable *only after proof of a secondary meaning.* The later Illinois opinions, the District Court opinions, and the earlier Court of Appeals opinions so interpret the *Lady Esther* case. In the absence of secondary meaning, the "palming off" or "deception" tests of the earlier cases must be applied, as was done by the District Court. The violation by the Court of Appeals of the principle of *Erie Railroad* v. *Tompkins* in applying some other unwarranted test calls for the exercise of this Court's supervisory jurisdiction.*

In the absence of correction of this error by the Court of Appeals, it will be possible to obtain diametrically opposed rulings on this point in the State of Illinois, depending on whether the case is decided by the state Courts or the Federal Courts. This result is the one sought to be avoided by vigorous application of *Erie* v. *Tompkins.* It would place the Illinois resident at a distinct disadvantage in his home market, as compared to the resident of another state who can bring suit for relief in the Federal Courts. Such a disparity must not be permitted.

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* As to how insistent this Court has been on the principle of *Erie* v. *Tompkins,* see *Huddleston* v. *Dwyer* (1944), 322 U. S. 232; *Vandenbark* v. *Owens-Illinois Glass Co.* (1941), 311 U. S. 538.

4. The Court of Appeals Substituted Its Judgment for That of the District Court in a Matter of the Evaluation of Evidence, Contrary to Rule 52(a), Basing Its Conclusion on Evidence Obtained in Violation of the Rules of Evidence, and Disregarding the Opportunity of the District Court to Adjudge the Credibility of Witnesses.

Rule 52 (a) was completely disregarded by the Court of Appeals in reaching its decision. Within the last two years there have been at least six petitions, filed from judgments of that Court in the limited field of patent, trade-mark and anti-trust law, charging violation of Rule 52 (a).* Such an indictment indicates that this Court should repudiate the preference of an independent trial of the facts by the Court of Appeals in all cases—not only those in which there is a clear question of whether the Findings are supported by substantial evidence.

But here, in addition to the usual situation under Rule 52 (a), there is a novel question of the law of evidence and its application. That question is:

> "May a Court of Appeals set aside Findings of Fact which are supported by substantial evidence in the Record made before the District Judge, purportedly preferring deposition testimony which is clearly improper?"

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*

Case	Term	No.
A.B.T. Mfg. Co. v. *National Rejectors Inc.*	Oct. 1951,	208
American Steel Foundries v. *Holland Company,*	Oct. 1951,	254
Milwaukee Towne Corp. v. *Loew's Inc., et al.,*	Oct. 1951,	439
Union Carbide and Carbon Corp. v. *Graver Tank & Mfg. Co., Inc., et al.,*	Oct. 1951,	714
Cardox Corp., v. *Armstrong Coalbreak Co.,*	Oct. 1951,	776
Hansen Mfg. Co. v. *General Time Corp.*	Oct. 1952,	530

Respondent took depositions in July 1949, and in April 1951, in an attempt to prove part of its case. If the improper leading questions and those answers which were objectionable are weeded out of the deposition testimony, it becomes apparent that Respondent proved only that it had employed the word Stronghold alone to identify the particular annularly threaded nail, and that the only trademark it owned was the complex registered design.

The witnesses were repeatedly interrogated by the use of leading questions, questions calling for hearsay evidence, questions calling for the answer to ultimate legal conclusions reserved to the Court, and other equally objectionable examination. In spite of objections, the witnesses were encouraged to answer the questions. The District Court was able to evaluate this testimony and to reach a decision without being influenced by inadmissible or objectionable evidence.

The Court of Appeals relied on objectionable deposition testimony to set aside Findings based on substantial evidence in the testimony taken in the presence of the District Judge, affording the opportunity to judge the credibility of the witnesses. The action of the Court of Appeals usurps one of the principal functions of the District Court.

Within the restricted scope of this Petition, it is impossible to note all of the places in which the Court of Appeals so relied on improper evidence. However, one of the glaring examples is in the setting aside of Findings 18, 19 and 20 (R. 450):

> "18. Plaintiff has not provided (proved) any damages, nor has any business been diverted from Plaintiff to Defendant. Plaintiff's officers admitted that they did not know of a single instance wherein a customer mistakenly purchased Defendant's goods while attempting to purchase goods from Plaintiff. There is no confusion or likelihood of confusion in the trade because

of Defendant's use of the Stronghold logotype. There has never been any confusion in the minds of purchasers between these two companies and their products.

"19. Defendant has used reasonable means to prevent confusion in the trade and diversion of business by referring customers for 'Stronghold' nails to the Plaintiff. There is no likelihood of confusion in the trade because Defendant is using reasonable means to prevent it by displaying the word Stronghold in its distinctive logotype.

"20. The five misaddressed letters introduced by Defendant are insufficient to show a likelihood of confusion in a business which exceeds five million dollars per year. This number of misaddressed letters is within the expected percentage of such incidents."

There never has been any confusion. Respondent's chief officers testified before the District Judge that they did not know of any confusion. As detailed earlier in this Petition, George Stone, Respondent's president testified (R. 260):

"Q. Mr. Stone, can you give us a single instance in which any of your customers mistakenly bought any products from Stronghold Screw Products instead of your company?

"A. No."

H. James Stone, Respondent's general manager stated (R. 286):

"A. I don't know that anyone has been buying from Stronghold Screw Products that meant to buy goods from us. I don't know whether any such case has occurred or not."

These responsible officers testified after all of the depositions were taken. In spite of this testimony, the Court of Appeals set aside those Findings, stating (R. 467):

"* * * However, the testimony in the case at bar abundantly proved that actual confusion existed. Wit-

ness after witness, such as the purchasing agent of Rubberoid (sic) Company and a Screw Machine Products salesman and others, as well as correspondence that was misdirected, demonstrated confusion did exist. * * * We conclude that the court's finding that there was no confusion in the trade was clearly erroneous."

What is the evidence on which the Findings were set aside?

Respondent introduced *all* of the "misdirected correspondence" which it was able to find—a total of FIVE letters (Pl. Ex. 152-156)—to show the existence of confusion. The trial Judge characterized this miniscule presentation in Finding 20, above. This is not the volume of evidence which convinced the Court of Appeals that the District Judge clearly erred in making his Finding.

Then what about the "Witness after witness, such as the purchasing agent of Rubberoid (sic) Company and a Screw Machine Products Salesman" who "demonstrated confusion did exist."

K. R. MacDonald, a purchasing agent of The Ruberoid Company (R. 97-105, 114-115) testified in deposition that he was not confused (R. 105):

"RXQ. You never ordered any nails from them, by mistake?

"A. No."

Later, after the next witness also had failed to prove the existence of confusion, MacDonald was recalled (R. 114-5):

"Q. Mr. MacDonald, what was the purpose of sending this circular that you received from Chicago, from the Stronghold Screw Products, or some similar concern, to the Independent Nail and Packing Company?

"A. Well, I was confused because I thought possibly Independent had established a company in Chicago, or a branch in Chicago, and I wanted to clear that up.

"Q. So you thought that the Stronghold Company had some connection with the Bridgewater Company?

"A. Yes. *The only confusion in my mind would come from the fact that this annular threaded nail has a thread on it that is somewhat similar to a screw.* The difference, of course, would be that you drive a threaded nail with a hammer, and you use a screwdriver to put in a screw." (Emphasis supplied.)

This leading examination can hardly qualify as the overwhelming evidence requiring the setting aside of the Findings, especially since it is abundantly clear that *MacDonald was never truly confused* as to the source or origin of goods.

S. T. Henvick, who purchased nails for The Ruberoid Company from 1938, testified (R. 105-114), and stated (R. 110) that he had never ordered nails from Petitioner. While attempting to recall Petitioner's name, he called it "*Chicago* Screw Products" (R. 111). There is no confusion here with regard to STRONGHOLD.

At R. 112, *in response to a clearly objectionable question,* Henvick did agree that the use of the word STRONGHOLD by another metallic fastener company would be confusing. *But,* in response to a proper question on cross-examination, there clearly was no confusion in his mind (R. 113):

"RXQ. There was never any confusion in your mind about Independent and this other company, Stronghold Screw Products, or Stronghold Eastern Corporation?

"A. No.

"RXQ. You never sent orders intended for one company to the other?

"A. No."

The evidence could not be more clear that *neither* of the Ruberoid purchasing agents had been or were likely to be confused. Then who is the "purchasing agent of Ruberoid Company" who was confused? **There was none!**

We can only guess as to which of the witnesses represents the "Screw Machine Products" salesman. The deposition witness Ward testified that he was confused—*in response to a clearly objectionable question* (R. 23). He also testified (R. 28) that *he had never bought any of Petitioner's products by mistake* while trying to buy from Respondent. Here again, any confusion or evidence thereof must be lightly regarded.

Goss, in his deposition, did not testify that he was confused, and his letter (Pl. Ex. 7) is under suspicion as spurious or inspired. No judge with any degree of sophistication in weighing evidence would give any credence to the deposition of Chaskes (R. 83-93) after he asserted (R. 86), *contrary to Respondent's officials* (R. 222, 246), that Respondent was in the shelf hardware business.

The Record has been diligently and unsuccessfully searched for *any* support for the statement of the Court of Appeals. The conclusion reached on this and other points by the Court of Appeals is clearly contrary to the overwhelming weight of the evidence. Once the rules of evidence are applied to the deposition testimony, there is no support in the Record for this and other statements in the Court of Appeals' opinion.

The action of the Court of Appeals in using this type of evidence as the basis for setting aside Findings of Fact supported by substantial and properly adduced testimony not only reaches an unsupported result but flouts the basic rules of Evidence. A litigant should not be permitted to obtain relief on this kind of evidence at the expense of the rights of the public. This type of evidentiary evaluation should not be permitted in the lower courts because it can have a serious effect on litigation in general. Only the action of this Court, in granting this petition, can prevent this.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

CASPER W. OOMS,
209 So. La Salle Street,
Chicago 4 Illinois,
Attorney for Petitioner.

ROBERT C. WILLIAMS,
209 So. La Salle Street,
Chicago 4, Illinois,
Of Counsel.

September 16, 1953.

APPENDIX.

STATUTE INVOLVED.

15 U. S. C., Sec. 1114(1):

> (1) Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; * * * shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided in this chapter, * * *.

BASIC

DATE 2/21/44 MACHINE 45

CUSTOMER'S NO. 20179 OPERATOR 15

OUR NO. 44803 COMPLETED 3-17-44

WHEN WANTED ✓ BY

QUANTITY ✓	100	LBS.	WEIGHTS
LENGTH	1		155
GAUGE	12		
HEAD	oval		
POINT	diamond		
GRIPE			
STYLE			
TEMPER			
THREAD	STRONGHOLD		
FINISH	plain		
		TOTAL ☞	155

PLAINTIFFS EX. 1437 Iden. Rec'd
U. S. DISTRICT COURT, Northern District of Illinois
Judge Perry
Official Court Reporter

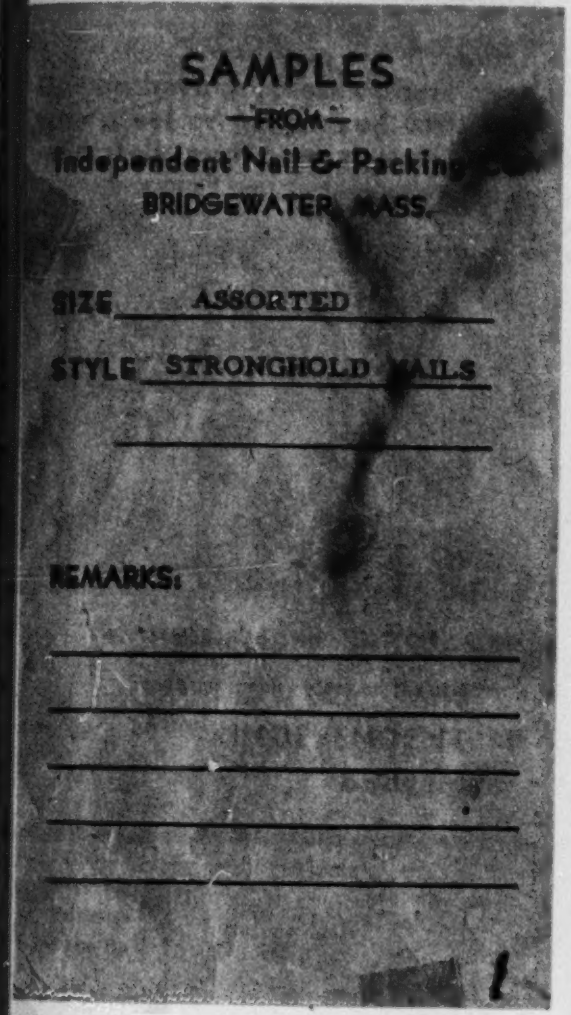
REMARKS:

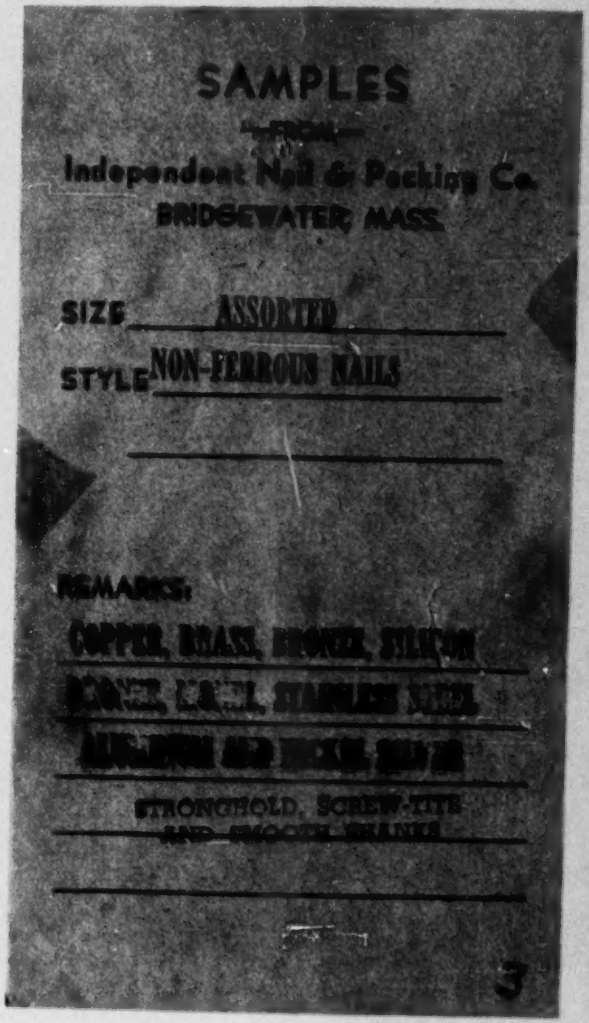
1 - mfg Screw Prod.

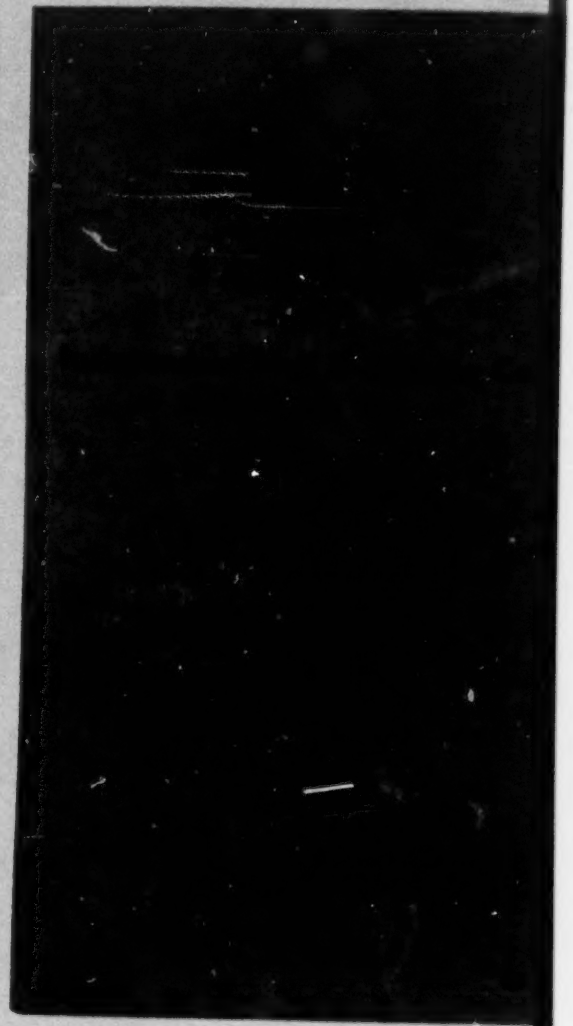
THIS SLIP WITH SAMPLES
MUST BE RETURNED TO OFFICE

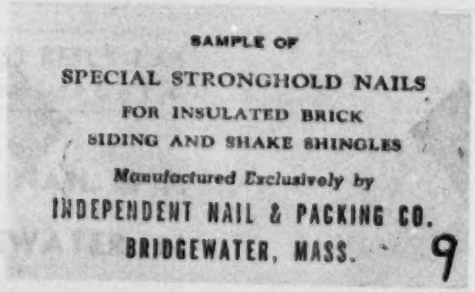
356 Independent Nail & Packing Co.

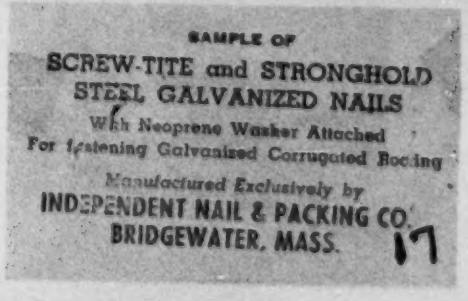
Items Nos. 1, 3, 6, 9 and 17 - From Pl. Ex. 14.







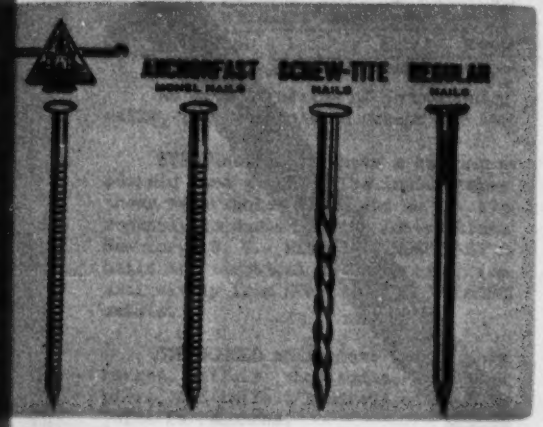




Stop Unnecessary Replacement and Repairs

IMMEDIATE SHIPMENT

Do you have processes where chemicals, acids, fumes or exposure ruin your steel or galvanized fasteners? This trouble can be eliminated immediately and permanently by using NON-FERROUS FASTENINGS.



- *The First Cost is the Last.*
- *Eliminate High Maintenance Costs.*
- *We make them in all styles and sizes, for hand or machine driving.*
- *Copper - Brass - Bronze - Silicon Bronze - Everdur - Stainless Steel - Monel - Aluminum - Nickel Silver.*

- IMMEDIATE SHIPMENT ON BRONZE STRONGHOLD ASBESTOS SIDING NAILS.

Send your inquiry today on the attached card. No postage required, and no obligation.

INDEPENDENT NAIL & PACKING CO.
Bridgewater, Massachusetts

15

Postage Will be Paid by Addressee

No Postage Stamp Necessary if Mailed in the United States

BUSINESS REPLY CARD
First Class Permit No. 2, Sec. 34.9 P. L. & R., Bridgewater, Mass.

INDEPENDENT NAIL & PACKING CO.

BRIDGEWATER, MASS.

Mail This Card Today

We Pay The Postage

INDEPENDENT NAIL & PACKING COMPANY

Manufacturers of

STRONGHOLD . . . "The One-Way Nail"

BRIDGEWATER, MASS.

CABLE ADDRESS: INAPACO

RECEIVED
STRONGHOLD SCREW PRODUCTS INC.
GEN. MAIL DEPT.
OCT 16 1950

DEFENDANTS EX. 39A ( ) Iden. (✓) Rec'd.
U. S. DISTRICT COURT, Northern District of Illinois
Judge Perry
Edward Newlander - Official Court Reporter

We [illegible] receipt of your inquiry regarding SCREW-TITE and STRONGHOLD nails, for [illegible] please accept our thanks.

STRONGHO[illegible] have a holding power which in actual tests have outheld wood s[illegible] The inside pages of this circular describes fully these remarkable [illegible] and we are also enclosing a reprint of tests recently conducted [illegible] International Nickel Company, 67 Wall Street, New York, N. Y., [illegible] ANCHORFAST nails. ANCHORFAST and STRONGHOLD nails are identical [illegible] exception that ANCHORFAST nails are made exclusively from MONEL [illegible] STRONGHOLD nails are made from a variety of metals.

STRONGHOLD nails have [illegible]ely used in the construction of boats, barges, pallets, shop boxes, [illegible]os, building construction, docks, piers, and in fact hundreds of [illegible]tions wherever a tight, permanent joint is required.

SCREW-TITE nails are a compani[illegible]o STRONGHOLD nails. We believe the correct nails for you to use can [illegible] determined by actual tests on your own application. We are herew[illegible]osing literature describing SCREW-TITE nails.

We can supply either SCREW-TITE or ST[illegible]nails in any size or style up to and including 6" in length and .2[illegible]ameter. Also, in a wide variety of metals and plated finishes, in[illegible]ot galvanizing, these nails can be had. We can also supply them[illegible]ial hardened steel for driving into extremely hardwoods or through s[illegible]l.

We would like very much to have you try these n[illegible] if you will be good enough to tell us what size or sizes you are i[illegible]d in, we shall be very glad to send you a free working sample.

Hoping to have the opportunity of working with you, and [illegible]g your reply, we remain

Very truly yours,

INDEPENDENT NAIL & PACKING [illegible]

By: _____

G. C. Stone - Sales Mg[illegible]

GCS:NH

THEY HOLD FOREVER
STRONGHOLD NAILS

Items Nos. 12, 1

IMMEDIATE SHIPMENT

Why The **Stronghold** *Holds!*

ACTUAL PHOTOGRAPH

REMEMBER—There is only one STRONGHOLD (THE ORIGINAL) Ask for them by name.

Hundreds of bottlers have found that a Stronghold fastened bottle case will outwear 2 or 3 cases assembled with ordinary nails.

The picture shows why.

When you buy a bottle case nailed with Strongholds, you save the cost of at least one additional case, and the extra cost is 1c (or less) per case.

● *Can you afford to pass up this saving?*

We'd like to send you some samples so you can make your own tests. Your Name and address on the attached card will bring complete information. No obligation.

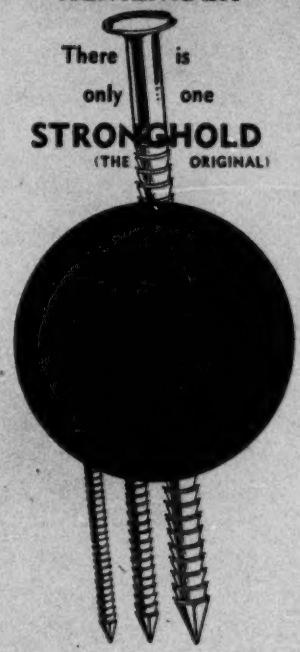
STRONGHOLD NAILS are made only by

INDEPENDENT NAIL & PACKING CO.

Bridgewater, Massachusetts

REMEMBER

There is only one **STRONGHOLD** (THE ORIGINAL)



Ask for them by name

Woode other Packin ing In longer NAIL

Availa wide machi

Specif your

Tear sampl **Strong** saving

IND

Postage Will be Paid by Addressee

No Postage Stamp Necessary If Mailed in the United States

BUSINESS REPLY CARD

First Class Permit No. 2, Sec. 510 P. L. & R., Bridgewater, Mass.

INDEPENDENT NAIL & PACKING CO.

BRIDGEWATER, MASS.

● *Mail This Card Today*

We Pay The Postage

Postage Will be Paid by Addressee

BUSINESS REPLY

First Class Permit No. 2, Sec. 510 P. L

INDEPENDENT NAIL

BRIDGEWATER

ys - Containers - Tote Boxes and
n Articles used in the Canning -
hydrating or other Food Process-
, will last from two to three times
fastened with STRONGHOLD

ll metals and finishes and in a
of sizes. Can be used in nailing

ONGHOLD nails when ordering
odenware.

enclosed card and mail for free
literature. Let us show you how
Nails can save you money by
wooden containers.

ENT NAIL & PACKING CO.
gewater, Massachusetts

No Postage Stamp Necessary If Mailed in the United States

Mail This Card Today

We Pay The Postage

ater, Mass.

KING CO.

S.

Why The Stronghold Holds

*ACTUAL PHOTOGRAPH: Note how wood fibres interlock with barbs of the nail, holding it firmly in position.

IMMEDIATE SHIPMENT

BEFORE laying linoleum, asphalt tile, rubber tile, carpeting, or any other floor covering, the under floor should first be made tight with STRONGHOLD NAILS.*

- Eliminates squeaky and springy floors.
- Will not work up and mar the floor covering—once driven in, STRONGHOLDS stay put.
- Used by many prominent floor covering applicators with great success.
- Available in all sizes, in hardened or regular steel.

Don't gamble with ordinary nails — Use STRONGHOLDS!
Remember There Is Only One "STRONGHOLD"–Ask For Them By Name.
(THE ORIGINAL)

We'd like to send you some samples so you can make your own tests. Your Name and address on the attached card will bring complete information. No obligation.

STRONGHOLD NAILS are made only by
INDEPENDENT NAIL & PACKING CO.
Bridgewater, Massachusetts

Postage Will be Paid by Addressee

No Postage Stamp Necessary if Mailed in the United States

BUSINESS REPLY CARD
First Class Permit No. 2, Sec. 510 P. L. & R., Bridgewater, Mass.

INDEPENDENT NAIL & PACKING CO.

BRIDGEWATER, MASS.

Mail This Card Today

We Pay The Postage

All Phones: [redacted]

REQUEST FOR QUOTATION

MANUFACTURERS SCREW PRODUCTS

PURCHASING DEPARTMENT

216-222 W. HUBBARD ST. — CHICAGO, ILL.

A [redacted] 1710

To receive consideration your quotation must be in our hands by IMMEDIATELY

TO INDEPENDENT NAIL & PACKING CO
BRIDGEWATER MASS

REPLY ☒Air mail ☐Phone ☐Wire

JANUARY 14, 1942 EL

IMPERATIVE Please state your very best delivery date	Indicate whether you regularly ship by R. R. FREIGHT, TRUCK, PARCEL POST, EXPRESS. Name your preferred common carrier. F. O. B. point and FREIGHT ALLOWANCE.	TERMS: 2% 10th Prox.

Please quote us promptly your best prices on the following material:

63,500 PCS. - #14 X 1" BRASS ESCUTCHEON PINS. $36.50 per cwt.

ADVISE BEST DELIVERY. QUOTE DELIVERY ON THE BASIS OF AN A-10 PRIORITY, AND ALSO WITHOUT A PRIORITY.

MUST HAVE PRIORITY OF A-10 OR BETTER

THIS IS NOT AN ORDER

Enclosed find Samples ( ) Specifications ( ) Prints ( ). Please return with your quotations.

If unable to quote, please return this inquiry sheet with the notation "cannot quote".

YOUR IMMEDIATE ATTENTION WILL BE APPRECIATED.

Thank you for your courtesy,

MANUFACTURERS SCREW PRODUCTS

Very truly yours,

by ..... Purchasing Agent

E;SI RMLeClaire:el

Independent Nail & Packing Co.